

# KELLER AND HECKMAN LLP

SERVING BUSINESS THROUGH LAW AND SCIENCE®

1001 G STREET, N. W.  
SUITE 500 WEST  
WASHINGTON, D.C. 20001  
TEL. 202.434.4100  
FAX 202.434.4646  
WWW.KHLAW.COM

WRITER'S DIRECT ACCESS

August 16, 2005

**John S. Eldred**  
(202) 434-4176  
eldred@khlaw.com

## Via Electronic Mail

Arthur Neal  
Director, Program Administration  
National Organic Program  
USDA-AMS-TMP-NOP  
1400 Independence Ave., SW  
Room 4008-So.  
Ag Stop 0268  
Washington, DC 20250

**Re: Comments on June 17, 2005 Advance Notice of Proposed Rulemaking,  
National Organic Program, Sunset Review; Docket No. TM-04-07**

Dear Mr. Neal:

We represent Brown-Forman Corporation, which supports the renewal of the exemptions contained on the National List for sulfur dioxide and tartaric acid. More specifically, Brown-Forman urges USDA to retain the listings in 7 C.F.R. §§ 205.605(a) and (b) for tartaric acid and in Section 205.605(b) for sulfur dioxide as an allowed synthetic "for use only in wine labeled 'made with organic grapes,' Provided, That, total sulfite concentration does not exceed 100 ppm". Our support for renewal is based on the fact that the use of these substances continues to meet the criteria of section 6517(c) of the Organic Foods Production Act (OFPA), 7 U.S.C. §§ 6501 *et seq.*, for inclusion on the National List.<sup>1</sup>

---

<sup>1</sup> Renewal, as well as original listing on the National List, requires that the described use of a substance:

- (i) would not be harmful to human health or the environment;
- (ii) is necessary to the production or handling of the agricultural product because of the unavailability of wholly natural substitute products; and
- (iii) is consistent with organic farming and handling.

7 U.S.C. § 6517(c).

Arthur Neal  
August 16, 2005  
Page 2

### **Sulfur Dioxide**

The reasons that use of sulfur dioxide in the production of wine meets the criteria of Section 6517(c) of the OFPA are discussed in detail in Brown-Forman's June 8, 2000 comments regarding USDA's March 13, 2000 proposed rule to establish the National Organic Program. A copy of those comments is enclosed and is incorporated herein by reference. As discussed in those comments, sulfur dioxide is necessary to produce wine that meets consumer expectations of quality, particularly given modern distribution systems. Sulfur dioxide controls spoilage organisms, prevents excessive oxidation and thereby produces wine that meets consumer expectations for quality. Wines produced without sulfur dioxide are not stable and will lose their varietal taste within the period of time that consumers expect to be able to keep wine.

There are no substantive human or environmental safety concerns raised by the limited use of sulfur dioxide allowed by the current listing for the substance. The listing carefully limits the level of sulfur dioxide and the safety of the presence of sulfur dioxide in wine is already addressed by regulations of the Food and Drug Administration (FDA) and the Treasury Department's Alcohol and Tobacco Tax and Trade Bureau. Regarding compatibility with organic farming and handling, as discussed in our June 2000 comments, de-listing sulfur dioxide and thereby prohibiting organic grape claims for sulfur dioxide treated wine would severely undercut organic farming by removing much of the economic incentive to invest in growing grapes organically and to pay for costly certification.<sup>2</sup>

Although the OFPA, as originally enacted, barred the use of sulfites, arguably including sulfur dioxide, in the handling of foods to be labeled as organic, late in 2000 Congress amended the prohibition to expressly exempt use of sulfites "in the production of wine". 7 U.S.C. § 6510(a)(3). The adoption of the exemption implies Congress' conclusion that use of sulfites for this particular purpose satisfies the criteria for inclusion on the National List. While the exemption does not mandate inclusion or maintenance of sulfur dioxide on the National List, it was clearly the intent of Congress that the substance be listed; otherwise the exemption would be pointless. The considerations that prompted Congress to take the extraordinary step of amending

---

<sup>2</sup> Brown-Forman was hardly alone in supporting the inclusion of sulfur dioxide on the National List for use in the production of wine. In the preamble to the December 21, 2000 final rule establishing the National Organic Program, USDA acknowledged that "[m]any commenters recommended that this final rule should allow for the use of sulfur dioxide in wine labeled 'made with organic grapes.' They argued that sulfur dioxide is necessary in organic wine production and that prohibiting its use would have a negative impact on organic grape production and wineries that produce wine labeled 'made with organic grapes.'" 65 Fed. Reg. 80548, at 80614 (Dec. 21, 2000).

Arthur Neal  
August 16, 2005  
Page 3

KELLER AND HECKMAN LLP

the OFPA to allow the use of sulfur dioxide have not changed since 2000. Use of sulfur dioxide remains necessary, safe, and consistent with organic farming and handling.

### **Tartaric Acid**

Tartaric acid, which currently appears in both Sections 205.605(a) and 205.605(b) of the National List, serves a variety of functions as a food ingredient. In the production of certain wines, as well as many other foods, it is used to control acidity. Although tartaric acid is naturally present in grapes, depending on the sugar content of the fruit, it is sometimes necessary to add more tartaric acid to increase the acidity of the wine. Achieving the appropriate pH enhances both the biological stability and the longevity of the wine. The use of tartaric acid to control the pH of food, and for other purposes, is clearly safe as it has been affirmed by FDA as generally recognized as safe for a variety of uses (21 C.F.R. § 184.1099). The National List entries for tartaric acid should be renewed since the considerations that led the NOSB to recommend the listing of the acid pursuant to the criteria of Section 6517(c) of the OFPA remain applicable.

For the foregoing reasons, we respectfully request that USDA renew the listings for sulfur dioxide and tartaric acid in Sections 205.605(a) and (b) of the National List.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John S. Eldred / jsm".

John S. Eldred

Counsel for Brown-Forman Corporation

Enclosure (June 8, 2000 comments)

cc: Mary E. Barrazotto

*Brown-Forman Corporation*

P O BOX 1080 - LOUISVILLE, KY 40201 - 502 565-1100

JUN - 9 2000

1:45 p.m.  
*[Signature]*

June 8, 2000

Keith Jones, Program Manager  
National Organic Program  
USDA-AMS-TMP-NOP  
Room 2945-So.  
Ag Stop 0275  
P. O. Box 96456  
Washington, D.C. 20090-6456

**Re: Comments on March 13, 2000 Proposed Rule to Establish a National Organic Program; Docket No. TMD-00-02-PR2**

Dear Mr. Jones:

Brown-Forman Corporation supports the development of national standards for organic foods and, in general, believes that USDA's March 13 proposal sets reasonable ground rules that will be beneficial to both consumers and the organic food industry. We are compelled, however, to express our strong objection to one aspect of the above-referenced proposed rulemaking, namely the proposed restrictions on the use of sulfur dioxide (SO<sub>2</sub>) in organic wine. If allowed to stand, these restrictions will result in market disruptions and economic hardship in the organic grape and wine industries by preventing winemakers who use sulfur dioxide in their wine from truthfully stating on the label of their product that it is made with organically grown grapes<sup>1</sup>.

The ultimate victims of these restrictions will be the organic grape producers, who will lose the lion's share of the market for their organic produce, and wine consumers, who will be deprived of the high quality wine from organically grown grapes that they have come to expect and will have to choose between wine not made from organically grown grapes and inferior quality wine without added SO<sub>2</sub>. We therefore urge the Department to modify its proposed rule so as to permit wine to which sulfur dioxide has been added to declare on its label "made from organic [or organically grown] grapes" so long as that statement is otherwise accurate under the rule.

Sulfur dioxide has been an integral part of wine production in this country and throughout the world for as long as anyone now alive has been drinking wine. The compound is necessary

---

<sup>1</sup> Bonterra Vineyards, owned by Brown-Forman Corporation, produces numerous wines made from organically grown grapes. Since its introduction in 1992, Bonterra wines have grown significantly with sales in the United States, the European Union and Japan. This year, over 165,000 cases of Bonterra wine will be produced from grapes sourced from twelve to fourteen organic vineyards independently owned in California.

to produce wine that meets consumer expectations of quality, particularly given modern distribution systems. Sulfur dioxide controls spoilage organisms, prevents excessive oxidation and thereby produces wine that meets consumer expectations for quality. Wines produced without SO<sub>2</sub> are not stable and will lose their varietal taste within the period of time consumers expect to be able to keep wine. There is no natural alternative to SO<sub>2</sub> use for wine. The National Organic Standards Board (NOSB) recognized the need for SO<sub>2</sub> and there appears to be nothing in the administrative record to refute the Board's conclusion.

While the Department may contend that the disallowance of organic claims for grapes when the wine is made using SO<sub>2</sub> adheres to the letter of the Organic Foods Production Act (OFPA), 7 U.S.C. §§ 6501 et seq., it actually frustrates the broader purposes of the statute by removing the chief economic incentive for organic grape growing. Furthermore, although it may be argued that the Act, on its face, appears to allow USDA to take a restrictive position on use of SO<sub>2</sub>, the Act by no means dictates such a stance, and, in fact, gives the Department ample discretion to create a limited exception to the statutory restriction on addition of sulfites to allow "made with organic grapes" claims on the label of wine produced with SO<sub>2</sub>. As detailed below, there are many reasons why USDA should exercise its discretion and allow "organic grape" claims for SO<sub>2</sub>-treated wine and we urge the Department to do so. In the face of the NOSB's recommendation in favor of such claims, and the rest of the record in this rulemaking, to do otherwise would raise serious question as to whether the Department is acting arbitrarily and capriciously and beyond its authority. We also believe that if USDA decides that the OFPA does not allow it to grant our requested change, the resulting suppression of truthful, nonmisleading claims such as "made with organic grapes" would violate the First Amendment under principles enunciated in recent commercial free speech judicial decisions. Finally, it is unreasonable to argue that consumers will be misled as to the organic nature of the product when the presence of sulfites in the wine is and will continue to be clearly disclosed.

### **The Role of SO<sub>2</sub> in Wine**

The exact origins of the use of sulfur compounds in wine are unclear, although numerous sources state that they have been used for centuries, if not since Roman times. The use of SO<sub>2</sub> as a gas in wine production can be documented as far back as the 1870's. In the United States, there is evidence of the use of potassium metabisulfite in wine production in California by the early 1900's and, after Prohibition ended, by the late 1930's the use of SO<sub>2</sub> or potassium metabisulfite was standard. For many decades SO<sub>2</sub> has been added to all types of wine to control the growth of spoilage bacteria and yeast not only in the United States, but everywhere in the world that wine is made commercially.

There is good reason why SO<sub>2</sub> has become a mainstay in wine production. Sulfur dioxide selectively controls bacteria and wild yeasts while permitting the more rapid growth of added yeasts.<sup>2</sup> The addition of SO<sub>2</sub> leads to the formation of sulfites, which control both lactic acid

---

<sup>2</sup> See *Encyclopedia of Food Technology*, Y.H. Hui (Ed.), Vol. 4 at 2857 (John Wiley & Sons, 1992) (see Appendix B).

producing bacteria, which can affect the taste or odor of the wine, and acetobacter bacteria, which produce vinegar.<sup>3</sup> It also keeps wine tasting fresh by preventing oxidation of the wine, which can occur due to exposure to oxygen when the wine is being moved from the fermentation vessel to the barrel and from the barrel to the bottle. Sulfur dioxide reacts with air and prevents the oxidation of the wine. If wine oxidates, the alcohol reverts to aldehydes, which results in a dull taste to the wine. Oxidation also causes browning of white wines.

An overview of the utility of sulfur dioxide in the production of wine is provided by a paper by F.W. Beech et al. titled "Recent Developments on the Chemical Aspect and Antimicrobial Action of Sulphur Dioxide", which was presented at the XVI International Congress of the OIV (the International Vine and Wine Office) in May 1979 in Stuttgart, Germany (see Appendix A to these comments). The authors state the "[n]o other simple additive possesses so many beneficial properties. It is an antioxidant, an inhibitor of oxidative enzymes; it combines with the oxidation products, stabilizes anthocyanin pigments, prevents production of darkening and certain hazes and it assures inhibition of a vast range of micro organisms." Beech at 1.

### **Impact of Sulfur Dioxide on Quality of Wine**

Although SO<sub>2</sub>'s antioxidant and antimicrobial effects contribute to the quality and stability of red wines, it offers its greatest benefits in the production of white wines. It is well-recognized that white wines without sulfites will lose their characteristic varietal taste within 5-6 months of bottling, will take on an aldehydic taste like sherry, and, within a year, turn brown due to oxidation. Oxidative effects are accelerated in a warm environment. The above-referenced paper by Beech et al. examined the effect of SO<sub>2</sub> on the quality of white wines using a panel of experienced wine tasters who evaluated the wines based on their aroma, taste and "general quality." The authors report that "important positive correlations" were established between the general quality of the wine and the level of SO<sub>2</sub> it contained. Overall, the paper concludes that SO<sub>2</sub> plays an "important role in the production of white wines." Based on the taste testing and the work of previous researchers, the paper concludes that SO<sub>2</sub> plays a role "as an anti-oxidant, antimicrobial agent and as an intrinsic part of the character of white wines" and "is very desirable as an anti-acetaldehyde agent in white wines."

The instability of wine without added SO<sub>2</sub> makes its marketing in national distribution systems problematic and essentially precludes its marketing overseas given the time lost while the product is in transit. This issue is discussed further below.

---

<sup>3</sup> Background on the microorganisms in wine that are controlled by SO<sub>2</sub> is provided in an article by Dr. Ralph Kunkee titled "The Making of Wine: An Overview About the Microorganisms in Wine," in the *American Vineyard* on-line publication of the U.C.-Davis Viticulture & Enology Lab. (see Appendix C).

## **USDA's Proposal Is at Odds with International Organic Standards for Labeling of Wine and Will Interfere with International Trade**

While numerous international organic standards preclude the use of sulfites or SO<sub>2</sub> in processed foods, they consistently carve out an exception to allow the use of sulfur dioxide in wine. For example, under the legislation governing organic claims in the European Union (EU), if grapes are produced organically, wine from those grapes may be labeled as made with organic grapes, notwithstanding the use of SO<sub>2</sub> during the production of the wine.<sup>4</sup> Such claims are also permitted under the organic standards of Australia<sup>5</sup> and those of the Codex Alimentarius Commission.<sup>6</sup> The labeling standards of the International Federation of Organic Agricultural Movements (IFOAM) also allow the use of SO<sub>2</sub> in "organic" wine and would obviously allow a "made from organic grapes" claim.<sup>7</sup> Conflict with international standards will impede international trade in organic wine. Indeed, since recognized international standards allow a label claim of "made from organic grapes" on sulfur dioxide-treated wine, a U.S. provision prohibiting such a practice could well amount to a breach of the Technical Barriers to Trade Agreement under the World Trade Organization and would thus expose the United States to a complaint of a WTO violation.

At the time of passage of the OFPA, Congress noted that American farmers were "beginning to benefit from lucrative organic export markets." S. Rep. No. 101-357, at 290. The Senate observed, however, that, in the absence of national standards, "American businesses are finding it increasingly difficult to negotiate in foreign markets." Clearly, Congress believed that the national standards mandated by the OFPA would help American farmers and businesses take advantage of organic export markets. In fact, a thriving export market for organic wine has developed even in the absence of federal standards. Ironically, and contrary to the intent of the OFPA, this market will dry up if USDA's proposal stands as is since the export market is unavoidably based on SO<sub>2</sub>-treated wines. It is not clear how wineries that currently market wines made with organic grapes overseas will adapt to the rule, if the restrictions on "organic grape" claims are not lifted. It seems doubtful that wineries will opt to produce two separate lines of products, one with SO<sub>2</sub>, the other without. If a winery cannot make organic grape claims

---

<sup>4</sup> See EU Directive 2092/91. SO<sub>2</sub> is generally prohibited, but its use in wine is expressly allowed.

<sup>5</sup> See National Standard for Organic and Bio-Dynamic Produce (2d Ed. April 1998), prepared by Organic Produce Advisory Committee of the Australian Quarantine and Inspection Service.

<sup>6</sup> See Codex Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods, CAC/GL 32-1999.

<sup>7</sup> IFOAM is a well-respected umbrella organization for various organic groups. The efforts of IFOAM to harmonize international organic standards was acknowledged by Congress in its report on the OFPA. See S. Rep. No. 101-357, at 290. IFOAM's standards include sulfur dioxide—as a food additive and processing aid in wine—on the list of approved ingredients of non-agricultural origin and processing aids used in food processing. Similarly, in the United Kingdom, standards for organic food and farming developed by the Soil Association allow the addition of sulfur dioxide to organic wine. See *Standards for Organic Food and Farming*, Sec. 10, Additional Standards for Specific Products, November 1997, The Soil Association Organic Marketing Company Ltd.

domestically, and U.S. sales represent the majority of its market, then it may no longer make economic sense for it to produce wine made from organic grapes just for foreign markets, particularly for wine sold in the EU where wines without SO<sub>2</sub> treatment are likely to be rejected as inferior.

According to Wine Institute figures, the export market for U.S. wine has been growing fairly steadily since the 1980's (7.3 million gallons in 1986) to a 1999 level of 75.4 million gallons (valued at \$548 million). Some of this wine is now made with organic grapes and there is no reason why much more of it could not be made that way. However, if SO<sub>2</sub> must be omitted to promote the organic nature of the grapes then this market for organic grapes will be largely untapped for we understand that the market for imported wine that has not been treated with SO<sub>2</sub> in Europe and elsewhere overseas is virtually nil.

The wine industry in the EU and elsewhere overseas can be expected to object to the impact of the proposal on wines that they sell in the United States since such wine meets labeling requirements outside the United States.<sup>8</sup>

#### **USDA Is Ignoring the Recommendations of the NOSB on Use of SO<sub>2</sub> in Organic Wine**

In refusing to allow made with organic grape claims for SO<sub>2</sub>- treated wine, USDA is disregarding the recommendations of the NOSB, which gave extensive consideration whether or not to allow use of SO<sub>2</sub> in organic wine. At its April 1995 meeting in Orlando, Florida, the NOSB considered a report regarding SO<sub>2</sub> prepared by a consultant hired to assess whether SO<sub>2</sub> should be added to the National List for use in wine. The Board also heard testimony on the subject. At the Orlando meeting, the Board concluded that SO<sub>2</sub> met the criteria of the OFPA for addition to the National List and approved the recommendation that SO<sub>2</sub> for use in organic wine be included on the National List. Specifically, the recommendation stated, "For use in organic wine only; May not be added to wine at levels greater than 100 ppm; the level of free sulfites may not exceed 35 ppm in the final product." At its March 1998, Ontario, Canada meeting, the NOSB qualified this recommendation, stating "Clarification of NOSB recommendation regarding sulfur dioxide: Sulfur dioxide is allowed only for use in production of wine that is labeled 'made with organically grown grapes.'" The NOSB was aware that the OFPA restricts the addition of sulfites by certified handlers. That is why the Board, at its Orlando meeting, decided that it could not recommend the listing of potassium metabisulfite. The Board, however, concluded that the statute did not prevent listing of SO<sub>2</sub> for the narrow purpose of its use in wine labeled as produced from organically grown grapes.

---

<sup>8</sup> We do not know the precise figures on imports of SO<sub>2</sub>- treated organic wines into the United States. In his comments on this proposal, Bill Powers of Badger Mountain Vineyards, which exports organic wine to Canada, Japan, and the EU, states that if the proposal remains as is "foreign producers would lose hundreds of products currently sold in the U.S. . . ." He predicts that this loss "could easily create trade war responses from European wine producing countries such as France and Italy."



## **There Is Broad Support for the NOSB's Recommendations on Use of SO<sub>2</sub> Within the Organic Industry**

USDA contends that prohibiting sulfites in wine reflects the trend in the organic industry as evidenced by California Department of Food and Agriculture's restrictions on SO<sub>2</sub> use in organic products. California's restrictions only relate to calling a wine "organic" when it has added SO<sub>2</sub>. Winemakers in California have long been making "organic grape" claims on the labels of wines with added SO<sub>2</sub> and continue to do so.

As to the trend in the organic industry, in comments on USDA's first organic proposal, a substantial segment of the organic industry advocated "organic grape" claims for wine with SO<sub>2</sub>. This position was supported by the Organic Trade Association (OTA), the Organic Materials Review Institute (OMRI) and the Henry A. Wallace Institute for Alternative Agriculture in their comments on the first USDA organic proposal.

OTA's March 9, 1998 comments on the original organic proposal state, "The OTA does support the NOSB recommendation to allow sulfur dioxide to be added to wine with restrictions as annotated on the National List . . . ." OTA Comments on Handling, Section F, p. 104. As recommended by the NOSB (prior to the clarification adopted by the Board at its Ontario meeting), OTA called for SO<sub>2</sub> to appear on the National List as follows: "Sulfur dioxide, in wine only at levels of 100 ppm or less, with level of free sulfites not exceeding 35 ppm in the final product."

OMRI's April 29, 1998, comments also supported the NOSB's recommendation regarding SO<sub>2</sub>.<sup>9</sup> Even producers of "no added sulfite" wines and other opponents of sulfites in "organic" wines told USDA that "made with organic grape" claims should be allowed for wines with added SO<sub>2</sub>.<sup>10</sup>

While generally supporting a prohibition on sulfites, the Wallace Institute comments state that "[w]e do, however, support the NOSB's recommendation to allow use of sulfur dioxide for use in winemaking, with certain restrictions."

---

<sup>9</sup> Regarding use of SO<sub>2</sub> in wine, OMRI notes that sulfites are explicitly prohibited as additives by the OFPA. The group states, "[s]ulfites are used to preserve and stabilize several different fruit products, most notably wine. The OFPA restriction would also mean that organic wines could not contain added sulfites." OMRI stated that it conceded "that there is a possibility that the use of sulfur dioxide as a sulfiting compound could be considered the addition of sulfite." OMRI comments, p. 68.

<sup>10</sup> Indeed, several commenters who opposed allowing "organic wine" claims for SO<sub>2</sub> treated wine agreed that "organic grape" claims should be allowed. For example, Mr. Phillip LaRocca, a producer of wines without added SO<sub>2</sub>, who submitted comments against organic wine claims for SO<sub>2</sub> treated wines stated in those comments that "wines which are made from organically grown grapes but add SO<sub>2</sub> in the processing of wine can and should be labeled 'made from organically grown grapes' or 'contains organic ingredients.'"

## **Impact of Restriction on "Organic Grape" Claims on Organic Farmers and the Environment**

Although the OFPA had several purposes, a major goal was to promote the growth of organic farming.<sup>11</sup> And yet USDA's interpretation of the Act as prohibiting organic grape claims for SO<sub>2</sub>-treated wine would severely undercut organic farming by removing much of the economic incentive to invest in growing grapes organically and to pay for costly certification. Organic certification of grapes can cost \$200 per acre or more. It is doubtful that grape growers will continue to pursue organic growing practices if they or their customers cannot promote the organic nature of the grapes. The restriction on organic grape claims could be a significant blow to organic farming in California since a substantial amount of the organic acreage in the state is grapes and a majority of these grapes are used in the production of wine. Winemakers should be allowed to promote the environmental benefits of organic grape growing to offset the cost of certification, and of utilizing organic practices, and to encourage continued use of organic farming practices.

### **"Organic Grape" Claims for SO<sub>2</sub>-Treated Wines Are Truthful and Not Misleading**

Assuming the grapes are grown in accordance with organic requirements, a label statement that wine is made from organic grapes is truthful even if SO<sub>2</sub> is added to the wine. Although USDA asserts that use of the word "organic" on the principal display panel (PDP) "carries with it connotations in the minds of consumers regarding the organic nature of the product" necessitating certification of handlers of such products, it is not clear that USDA's position is accurate nor that it is based on any consumer surveys or other evidence. If it is not misleading for a product to be labeled as "organic" when it contains 5% synthetic ingredients, how can it be misleading to describe the grapes in wine as organic when they make up over 99% of the product? It is difficult to see how it reasonably can be argued that consumers will be misled as to the organic nature of the product as a whole when the presence of sulfites in the wine is and will continue to be clearly disclosed pursuant to Bureau of Alcohol, Tobacco and Firearms regulations. Furthermore, some wineries are apparently committed to producing wines without added SO<sub>2</sub>, so those consumers who wish to avoid sulfites will still have the ability to do so.

The requirement that sulfites be declared effectively serves as a disclaimer preventing consumers from being misled about the organic nature of wine that bears a "made from organic grapes" claim. In fact, a final rule that would suppress truthful, nonmisleading claims such as "made with organic grapes" would appear to violate the First Amendment to the U.S. Constitution as construed under recent commercial speech cases, including 44 *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), and *Pearson and Shaw v. Shalala*, 1999 U. S. App. LEXIS 464 (Jan. 15, 1999).

---

<sup>11</sup>One of the express purposes of the Act is to facilitate interstate commerce in fresh and processed food that is organically produced. 7 U.S.C. §6501(3). The Senate Report on the OFPA indicates that a goal of the Act is to allow national and international trade in organic foods to "prosper." Senate Report No. 101-357, at 289.

In 44 *Liquormart*, the Court stated that the First Amendment "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good" declaring unconstitutional Rhode Island's ban on liquor price advertising. 116 S. Ct. 1508. In *Pearson*, which involved FDA prohibitions on health claims for which there is not "significant scientific agreement," the Court of Appeals for the D.C. Circuit found that FDA was imposing an unconstitutional burden on protected commercial speech by refusing to even consider using disclaimers to avoid deceptive health claims. The D.C. Circuit reviewed FDA's rejection using the four-prong test for permissible regulation of commercial speech under the First Amendment standard developed by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*. The Court found that, by failing to consider any clarifying disclaimer to health claims that would accurately communicate the level of scientific support, FDA's approval process had not satisfied the fourth prong of the test. Under that prong, the government process must avoid needlessly restrictive regulation of commercial speech by having a "reasonable fit" between the government's legitimate goal of protecting the public and the restrictions on speech chosen to advance that goal. This prong of the *Central Hudson* test imperils USDA's rule since the Department cannot plausibly argue that there is a "reasonable fit," between its suppression of "made with organic grape" claims and the goals of the OFPA when barring such claims is clearly contrary to the purposes of the Act, both with regard to increasing organic farming in the United States and encouraging international trade in organic food.

#### **USDA Has Discretion Regarding Restriction on Sulfites**

Allowing organic grape claims for SO<sub>2</sub>-treated wine makes good sense for a variety of reasons, including (1) the poor quality of non- SO<sub>2</sub>-treated wine; (2) its distribution limitations due to instability/short shelf-life; (3) promoting organic grape production; and (4) maintaining harmony with international standards. However, in the preamble to the proposed rule USDA erroneously contends that the Act precludes it from allowing use of SO<sub>2</sub> in organic wine or allowing "made with organic grape" claims because SO<sub>2</sub> "produces sulfites, which are prohibited in the OFPA, as a byproduct." 65 Fed. Reg. 13512, at 13590. It should be pointed out that the Act does not prohibit the presence of sulfites in food, nor does it prohibit the addition of sulfur dioxide. It prohibits the addition of sulfites by certified handlers.<sup>12</sup> If the Act prohibited the sulfites, *per se*, then no wine could be called organic since wine naturally contains a low level of sulfites.

USDA properly could distinguish the addition of SO<sub>2</sub> from the addition of sulfites, as the NOSB did when it recommended listing of SO<sub>2</sub> for use in wine but refused to recommend the listing of potassium metabisulfite for the same purpose. However, even if it is conceded that addition of SO<sub>2</sub> is tantamount to adding sulfites, USDA has the discretion under the OFPA to allow the use of SO<sub>2</sub> in wine for the limited purpose of making "made with organic grape" claims on the main label of wine. Indeed, in light of the record developed in this rulemaking

---

<sup>12</sup> Section 6510(a)(3) of the OFPA states that for a handling operation to be certified, each person shall not, with respect to any agricultural product covered by the Act, "add any sulfites, nitrates, or nitrites."

regarding the need for SO<sub>2</sub> in this specific application, it arguably would be an abuse of discretion for USDA to choose not to allow “made with organic grape” claims for wine treated with SO<sub>2</sub>.

USDA’s assertion that the Act precludes the result we seek here is erroneous because the Act clearly permits the restriction on addition of sulfites in the handling provisions to be waived by USDA pursuant to Section 6505(c), which provides that for products that contain at least 50% organic ingredients, the Department has the discretion to waive the requirement that an agricultural product be “produced and handled” in accordance with Act and to allow the word “organic” on the principal display panel only for the purpose of describing the product’s organically produced ingredients. The National List is also a “production and handling” requirement of the Act. Accordingly, the listing requirement can be waived by the Secretary as part of a determination, under Section 6505(c), to permit “organic grapes” on the label of wine made with SO<sub>2</sub>.<sup>13</sup> If USDA deems it necessary to include SO<sub>2</sub> on the National List, then it should do so. The Act does not prohibit listing of SO<sub>2</sub> or sulfites and the NOSB has already gone on record in favor of listing of SO<sub>2</sub> for this specific purpose. As noted above, the NOSB concluded that such use of SO<sub>2</sub> meets the listing criteria of Section 6517. USDA has not questioned the NOSB’s conclusions in this regard nor is it apparent that there is evidence in the public record of this rulemaking that would support a conclusion that SO<sub>2</sub> for use in wine does not satisfy the criteria for listing.<sup>14</sup>

The Secretary of Agriculture, in determining whether to establish an exemption under Section 6505(c), is required to consult with the NOSB and the Secretary of Health and Human Services (HHS). The NOSB’s position on this issue should be clear given their recommendation that SO<sub>2</sub> be allowed for the limited purpose of “made with organic grape” claims. Nothing in the record indicates that NOSB does not continue to support this position. Thus, presumably NOSB

---

<sup>13</sup> Separate from the National List requirement in the handling provisions of Section 6510, Section 6504 of the OFPA provides that to be labeled as an organically produced agricultural product, an agricultural product shall have been produced and handled without the use of synthetic chemicals, “except as otherwise provided in this chapter.” We believe Section 6505(c) is capable of overriding this provision as well since Section 6505(c) states that the requirement that an agricultural product be labeled as organically produced only if it is produced and handled in accordance with the Act “shall not apply” where USDA decides to create an exemption under subsection (c). Therefore, notwithstanding the general requirement for inclusion on the National List of non-organic ingredients in organic products, we believe that USDA has authority under Section 6505(c) to allow an organic ingredient claim without adding SO<sub>2</sub> to the National list.

<sup>14</sup> If a substance is to appear on the National List, USDA, in consultation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, must conclude that use of the substance:

- (i) would not be harmful to human health or the environment;
- (ii) is necessary to the production or handling of the agricultural product because of the unavailability of wholly natural substitute products; and
- (iii) is consistent with organic farming and handling;


7 U.S.C. § 6517(c). For the limited purpose for which listing would be sought, the controlled use of SO<sub>2</sub> clearly satisfies these criteria.

would support either reinstatement of its qualified listing of SO<sub>2</sub> or an allowance of SO<sub>2</sub> by waiver without inclusion on the National List. While we do not know the position of the Secretary of HHS on this matter, since the purpose of seeking HHS input is presumably to ensure that the action is consistent with food safety requirements, we would expect HHS to have no objection to such a waiver since the Food and Drug Administration has concluded that sulfites in wine are safe so long as the presence of sulfites is declared on label.<sup>15</sup>

For all the foregoing reasons, we respectfully urge USDA to exercise its discretion under Section 6505(c) of the OFPA and amend its proposed regulations, as needed, to allow "made with organic grape" claims on the PDP of wines that have been processed with SO<sub>2</sub>.

Respectfully submitted,

BROWN-FORMAN CORPORATION



Mary E. Barrazotto

MEB/fmk

---

<sup>15</sup> See December 19, 1988 FDA proposal to affirm GRAS status of sulfur dioxide for use in various foods. 53 Fed. Reg. 51065.